BRF170

Supreme Court, U.S.
FILED
NOV 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-883

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ISIDRO MORALES, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH A. CONNORS III
Counsel of Record
804 Pecan Blvd.
McAllen, Texas 78502-5838
(512) 687-8217

ATTORNEY FOR PETITIONER

FIRST QUESTION PRESENTED

In violation of Isidro Morales' Fifth Amendment Miranda rights as elucidated in Doyle v. Ohio, 426 U.S. 610 (1976), plain errors occurred in the jury's presence when the United States District Judge and the United States Attorney improperly and continuously asked questions of Constable Isidro Morales and Sheriff Ramiro Castellano regarding Isidro Morales' silence after he was arrested and Mirandized (Pet.App. 31-48). To Morales' prejudice, these plain errors were expressly capitalized upon during the prosecutor's unobjected to jury summation (Pet.App. 53-56; 59-60).

SECOND QUESTION PRESENTED

In the prosecutor's calling attention during both opening and rebuttal jury argument (Pet.App. 53, 56, 59-60) to Isidro Morales' post-arrest post-Miranda warning silence as evidence from which the jury should draw the inference that Morales' undercover defense was untrue and concocted only after the arrest, this prosecution misconduct so infected the trial with unfairness as to result in the denial of the defendant's Sixth Amendment right to a fair trial.

THIRD QUESTION PRESENTED

In failing to find plain error under Federal Rule Criminal Procedure 52(b), the Court of Appeals erred where although defense counsel failed to object at trial, Isidro Morales is entitled to a new trial since it was fundamentally unfair for the United States district judge and prosecutor to breach the Miranda warning promise that "silence will carry no penalty" by both using Isidro Morales' postarrest, post-Miranda warnings silence

a) to impeach Morales' trial testimony in violation of the fundamental fairness that the Due Process Clause requires as elucidated in Doyle v. Ohio, 426 U.S. 610 (1976);

b) as evidence of Morales' guilt and of the recent fabrication of his subsequent defense of simultaneous narcotic undercover work in violation of the fundamental

fairness that the Due Process Clause requires as elucidated in Wainwright v. Greenfield, 474 U.S. 284 (1986), and

since the probative value of that silence in this case was so outweighed by the intolerably prejudicial impact of admitting it into evidence that in the exercise of this Court's supervisory authority over lower federal courts, the judgment of the court of appeals should be reversed under United States v. Hale, 422 U.S. 171 (1975).

FOURTH QUESTION PRESENTED

The Court of Appeals reversibly erred in failing to find defense trial counsel was ineffective for failure to object not only to the prosecution summation references to Isidro Morales' postarrest post-Miranda silence but also to the numerous occasions of judicial and prosecution interrogation thereon in violation of Doyle v. Ohio, 426 U.S. 610 (1976) and Wainwright v. Greenfield, 474 U.S. 284 (1986).

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit were: The United States of America and Petitioner Isidro Morales.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioner's undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Morales was represented at trial by attorney Robert Nino and at the court of appeals by attorney Jesus Maria Alvarez.

TABLE OF CONTENTS

	Page
FIRST QUESTION PRESENTED	i
SECOND QUESTION PRESENTED	ii
THIRD QUESTION PRESENTED	iii
FOURTH QUESTION PRESENTED	v
LIST OF ALL PARTIES BELOW	vi
STATEMENT OF RELATED CASES AND PROCEDINGS	vi
IDENTITY OF DEFENSE COUNSEL BELOW	vi
THIS TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	viii
Cases	viii
Constitutional Provisions	x
Statutes	x
Rules	x
TABLE OF CONTENTS TO APPENDIX TO THIS PETITION	xi
OPINIONS BELOW	1
JURISDICTION	2
REASONS FOR REVIEW	2
RELEVANT CONSTITUTIONAL PROVISIONS ...	6

STATEMENT OF THE CASE 7

Procedural History 7
Statement of Facts: Government ... 9
Statement of Facts: Defense 18

SUMMARY OF THE ARGUMENT 24

ARGUMENT 28

Circuit Judge Smith's Dissent 28
Other Supreme Court Cases 36
Constitutional Error and Harm 40
Other Doyle Plain Error-Incompentency Cases 40
Government's Egregious Rebuttal ... 48

CONCLUSION 56

TABLE OF AUTHORITIES

Page

Cases

Alston v. Garrison, 720 F.2d 812 (CA4 1983) 5,43,44

Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980) 24

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) ... i,iii,v,2,24,25,27,38,41,50

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) 10

Greer v. Miller, ___ U.S. ___, 107 S.Ct. 3102, ___ L.Ed.2d ___ (1987) 38

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) 40

Hawkins v. LeFevre, 758 F.2d 866 (CA2 1985) 4

Satterwhite v. Texas, ___ U.S. ___, 108 S.Ct. 1792, ____ L.Ed.2d ____ (1988) 40

Strickland v. Washington, 466 U.S 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 27

United States ex rel. Smith v. Rowe, 618 F.2d 1204 (CA7 1980) 44,45

United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) iv,37,48-50

United States v. Harp, 536 F.2d 601 (CA5 1976) 3

United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) 40

United States v. Massey, 687 F.2d 1348 (CA10 1982) 4,45

United States v. Morales, 854 F.2d 61 (CA5 1988), rehearing denied, ____ F2d. ____ 1,28

United States v. Polsinelli, 649 F.2d 793 (CA10 1981) 3

United States v. Shue, 766 F.2d 1122 (CA7 1985) 3,41,42

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) 24

Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) iv,v,2,27,36,50,53

Constitutional Provisions

United States
Fifth Amendment i,6
Sixth Amendment ii

Statutes

18 U.S.C. 924(c)(1) 7
18 U.S.C. 3013 8
18 U.S.C. 3231 7
21 U.S.C. 846 7,8
21 U.S.C. 841(a)(1) 7,8
21 U.S.C. 841(b)(1)(D) 7,8
28 U.S.C. 1254(1) 2
28 U.S.C. 1291 2
28 U.S.C. 2254 36,44,45

Rules

Federal Rule of Criminal Procedure 52(b) iii,24

Supreme Court Rule 29.1 2

TABLE OF CONTENTS TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

	Page
TABLE OF CONTENTS	2
CIRCUIT COURT'S JUDGMENT	3
CIRCUIT COURT'S OPINION	4
CIRCUIT COURT'S REHEARING DENIAL	24
DISTRICT COURT'S JUDGMENT	26
INDICTMENT	29
PROBLEMATIC INTERROGATION I	31
PROBLEMATIC INTERROGATION II	39
PROBLEMATIC INTERROGATION III	42
PROBLEMATIC INTERROGATION IV	45
PROBLEMATIC SUMMATION I	49
PROBLEMATIC SUMMATION II	59

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

ISIDRO MORALES, Petitioner
VS.
UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

ISIDRO MORALES petitions for review of the judgment, opinion and rehearing denial of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgment is unreported (Pet.App. 26-28). The appeals court's opinion (Pet.App. 4-23) is reported. United States v. Morales, 854 F.2d 61 (CA5 1988), rehearing denied, ____ F2d. ____ (Pet.App. 24-25).

JURISDICTION

The court of appeals had jurisdiction of petitioner's direct appeal by virtue of 28 U.S.C. 1291. It entered its judgment and opinion on August 19, 1988 (Pet.App. 3, 4-23). That court denied Morales' timely petition for rehearing and suggestion for en banc rehearing on September 26, 1988 (Pet.App. 24-25). Within the 60 day period following September 26, 1988, this petition was mailed for filing by the Clerk of this Court. Supreme Court Rule 29.1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

REASONS FOR REVIEW

The court of appeals for the Fifth Circuit has rendered a decision herein in conflict with Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986).

Concerning the first three questions presented herein, the Court of Appeals judgment herein is also contrary to:

(1) United States v. Shue, 766 F.2d 1122 (CA7 1985) [where the constitutional Doyle error was held to be plain and not harmless];

(2) United States v. Harp, 536 F.2d 601 (CA5 1976) [where the unobjected to Doyle errors in closing argument necessitated reversal under a plain error review, because the prosecutor's comments struck at the jugular of the defendants' "transparently frivolous duress defense", those remarks cannot be classified as harmless];

(3) United States v. Polsinelli, 649 F.2d 793, 798 (CA10 1981), where the court held that where the case comes down to a one-on-one situation, i.e., the word of the defendant against the word of the key prosecution witness, and there

is no corroboration on either side, the importance of the defendant's credibility becomes so significant that prosecutorial error attacking that credibility cannot be harmless beyond a reasonable doubt];

(4) Hawkins v. LeFevre, 758 F.2d 866 (CA2 1985) [where though defendant had failed to object in the state court, habeas corpus relief was granted because harmful constitutional error occurred when the trial judge at a bench trial violated the Due Process Clause by using Hawkin's postarrest, post-Miranda warning and pre-trial silence to discredit his exculpatory story presented at trial]; and

(5) United States v. Massey, 687 F.2d 1348 (CA10 1982) [where deputy sheriff Massey presented a defense that he had been working in an undercover capacity at the time in question, the court

found it could not consider harmless the errors in the government's lengthy cross-examination of Massey and subsequent jury summation about Massey's postarrest failure to tell the authorities that he had been working in an undercover capacity in an effort to impeach Massey's defense and to encourage the jury to conclude Massey's exculpatory story was untrue, if upon remand there was a factual finding Massey was informed at the time of his arrest of his constitutional right to remain silent].

Concerning the fourth question presented, the judgment and opinion of the Court of Appeals herein conflicts with:

(1) Alston v. Garrison, 720 F.2d 812 (CA4 1983) [where relief under 28 U.S.C. 2254 was granted because trial counsel's failure to object to

prosecution evidence that defendant had stood on his constitutional rights to remain silent during interrogation denied defendant effective assistance of counsel to a degree that prejudiced the outcome of the state trial].

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

A. Procedural History

On April 2, 1987, two defendants, including petitioner, were indicted in a two-count indictment in Cause No. B-87-182 (Pet.App. 29-30). Count 1 alleged a conspiracy from on or about April 1, 1987 to on or about April 2, 1987, to possess with intent to distribute a quantity of less than 50 kilos of marihuana, in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(D); and Count 2 alleged knowing and intentional use or carrying a 45 caliber automatic firearm during the commission of the drug trafficking crime charged in Count 1 of the indictment, in violation of 18 U.S.C. 924(c)(1).

The district court had jurisdiction under 18 U.S.C. 3231.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was found

guilty as charged in Count 1 of conspiracy to possess marihuana with intent to distribute it, in violation of 21 U.S.C. 846, 841(a)(1), and 841(b)(1)(D). The jury found petitioner not guilty of Count 2. Petitioner was sentenced to a four year prison term. In addition, the district court imposed a $50 assessment pursuant to 18 U.S.C. 3013 (Pet.App. 26-28). On July 28, 1987, the district court's judgment was signed (Pet.App. 26-28). Notice of appeal was timely filed on August 4, 1987.

A panel of the court of appeals split herein on the Doyle issue. Over Circuit Judge Smith's pointed dissent, the majority of the panel affirmed petitioner's conspiracy conviction. The court of appeals found that the trial references petitioner claimed as Doyle violations did not amount to plain error, no objections having been made at trial. The court of appeals rejected petitioner's claim that defense

counsel was ineffective for failure to object to the comments on petitioner's silence and for presenting both a claim of innocence and an entrapment defense.

The court of appeals denied petitioner's timely filed petition for rehearing and suggestion for rehearing en banc. There, petitioner had phrased the issue on rehearing as follows:

> The improper questioning by the United States District Judge and the United States Attorney regarding Isidro Morales' post-arrest silence constituted "plain" and "fundamental" error that has resulted in the likelihood of a grave miscarriage of justice, and a violation of Doyle v. Ohio, 426 U.S. 610 (1976).

B. Statement of Facts: Government

Because the factual setting of this case will bear so prominently in this Court's ultimate determination, the relevant facts are carefully set forth. Viewing the evidence and all reasonable inferences which may be drawn therefrom in the light most

favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the evidence at trial showed that a confidential informant tipped DEA Agent Allan Tittle that the duly elected Constable of Precinct 3, Brooks County, Texas, Isidro Morales, was willing to assist drug smugglers in circumventing the U.S. Border Patrol check- point near Falfurrias, Texas (2R. 27, 32, 57). The jury was instructed to disregard any hearsay statements that the confidential informant may have passed about prior actions about any defendant (2R. 80). Tittle and the informant telephoned Morales at his home in the Encino-Rachal area to try to arrange for Morales to carry marihuana around that Border Patrol checkpoint (2R. 26-28, 32-34, 39-40, 121-123). About 9:15 a.m. on April 1, 1987, the informant introduced Morales to agent Tittle of the Drug Enforcement Agency (DEA) over the telephone (2R. 31-32, 35).

On the phone, they agreed to meet at 4:00 p.m. that afternoon at Delicias restaurant in Rachal, Texas (2R. 34). The telephone conversation in which this meeting was arranged was tape recorded. That tape, Government's Exhibit No. 1, was admitted into evidence (2R. 31-32). That tape was played to the jury (2R. 38-39).

Agent Tittle and the informant met Morales at Delicias restaurant on April 1, 1987 at 4:00 p.m. (2R. 40). Agent Tittle was posing as a drug supplier from McAllen-Edinburg who was having difficulty smuggling marihuana through the Falfurrias checkpoint (2R. 26-27, 90). They sat in Morales' red pick-up truck in the parking lot and negotiated the deal (2R. 41). During the meeting Morales was armed with his service revolver, a .45 caliber automatic Colt Commander, unholstered on the front seat of the truck underneath his right leg (2R. 42, 57, 73). His police radio was

on the dashboard (2R. 42). Tittle pretended that he was afraid that Morales, a constable, would arrest him. Morales pointed to his badge on the sun visor and reassured Tittle that they did not enforce those type of laws, that he served papers mostly, and that Tittle had nothing to worry about because as long as Morales had his police radio, he knew the location of every law enforcement officer in the county (2R. 42, 43). Morales also paid careful attention to the surveillance agents' van: license number: 239 NKF. It was the only other vehicle in the restaurant parking lot, and Morales watched its occupants carefully as they pretended to get water from a nearby house (2R. 92).

Agent Tittle agreed to pay Morales $20 per pound of marihuana to be transported (2R. 33, 44, 159). In exchange for this fee, Morales would not personally transport the marihuana, but would pay a trusted

driver who was familiar with the ranch and farm roads to drive the load of marihuana around the checkpoint (2R. 33, 34). Tittle agreed to bring a test load of 100 pounds of marihuana to Delicias at 4:00 a.m., Friday morning, and turn over his marihuana laden car, car keys and $2,000 paid in advance to the driver, who would exchange vehicles with Tittle, go through some ranches bypassing the checkpoint, and meet Tittle on the other side of Falfurrias (2R. 33-34, 71). Morales specified that the job would have to be done in the early morning hours, around 3 or 4 a.m. (2R. 44), to reduce the risk of detection by law enforcement officials. Only one Sheriff's deputy and no Department of Public Safety (DPS) officials was on patrol between 2:00 and 5:00 a.m. and there was no deputy on patrol at all between 5:00 and 8:00 a.m. This had been the schedule since Morales took office in January, 1985 (3R. 230). Morales selected 4:00 a.m.

"[b]ecause there is not too many people that see what you are doing" (2R. 48). Morales informed Tittle that he would need an extra $500 for his driver to pay the ranch hands of the various ranches to unlock strategic gates to facilitate the early morning drug run (2R. 43-44, 89). Morales' driver had to make his next run on Friday between 3:00 to 4:00 a.m. (3R. 44). Their meeting was concluded by scheduling another meeting for 10:00 a.m. the following day at Delicias, to which Tittle was to bring $500 for the driver and ranch hands (2R. 43, 45, 46).

At 10:00 a.m. the next morning, April 2, Agent Tittle and the confidential informant returned to Rachal to meet Morales at the same restaurant parking lot to deliver $500 expense money to Morales (2R. 45-46). Morales was parked on the roadside near the restaurant. Morales said he was waiting on the driver to appear. Morales asked them to follow him to his own home.

There they met Gonzales, the driver (2R. 47-51). Tittle tried to give the $500 to Morales who said, "No, don't give it to me. Give it to him. He's the one that needs the money." But Tittle gave Morales the money who turned and handed it to Gonzales, who put it in his pocket (2R. 51). Morales and Gonzales then reviewed the details of the next day's smuggling plan and proposed that if Gonzales could find the people who operated the ranch gates they could smuggle the marihuana that night instead of waiting until Friday morning (2R. 51-52). However, unless they called to the informant's house with clearance to go ahead and do the deal that evening, Tittle was to show up early the following morning at Delicias with the marihuana (2R. 52-53).

As Tittle and the informant left the meeting place after being there about fifteen minutes, Tittle gave a bust signal. Tittle made a U turn and drove in onto

Morales' property in Encino, arriving at the same time as the vehicles of the surveillance agents. That surveillance team consisted of several DEA Agents, DPS investigator Bingham, and the Brooks County Sheriff. Morales and Gonzales were arrested at 10:30 or 11:00 a.m. and their Miranda rights were read to them in Spanish and English (2R. 54-55, 83, 139, 174-175, 188; 3R. 213, 223-224). Gonzales spoke English (2R. 50, 104, 181) as does Morales (2R. 119). After Gonzales' arrest, DEA Agent Morrison removed the marked $500 from Gonzales' pocket. Morales' weapon, which firearm contained five live rounds of ammunition, was taken from the front seat of Morales' truck. Also seized was Morales' Constable Badge. It has the name Isidro Morales under it and a statement of Miranda rights on a card (2R. 55-58, 108).

After they were arrested, both Morales and Gonzales made statements to law

enforcement officials. Morales and the Sheriff, Ramiro Castellano, knew each other and were on good terms (2R. 173-174). When Sheriff Castellano arrived at the arrest scene, he stepped out of his vehicle and asked Mr. Morales, "Que paso, Isidro?" translated, "What happened Isidro?" Morales replied, "No se porque estos hombres me trajeron aca" translated, "I don't know why these men are bringing me here" (3R. 224). Castellano, who had initiated the conversation, did not interrupt him or cut him off (3R. 225). Morales said nothing further at that time, and did not claim, at that point, to have been conducting his own undercover operation (3R. 224). Gonzales also spoke with Sheriff Castellano, whom he knew. He asked the Sheriff if he would telephone his sister-in-law (2R. 190; 3R. 225). Gonzales also made no protestation that he believed he was involved in an undercover operation (3R 225).

The two were transported to McAllen and their paperwork was processed. Later that afternoon around 3:00 p.m., on the way to appear before the United States Magistrate, Morales informed Tittle that he had been conducting his own undercover investigation of Tittle and the confidential informant, whom he believed were drug traffickers (3R. 215). This conversation occurred four to five hours after Morales' arrest; he had had numerous earlier opportunities to convey this information to the officers (2R. 176; 3R. 215).

C. Statement of Facts: Defense

At trial, Morales testified and presented a defense based upon lack of criminal intent. He maintained that he was involved in the smuggling scheme only in an undercover capacity, in an effort to arrest Agent Tittle and the confidential informant. His reason for such an undertaking was "because these people kept pushing me" (2R.

156) and to make people realize he was doing his job (2R. 131).

Morales testified (2R. 104-178). He is fifty, has a sixth grade education and a GED certificate (2R. 105, 107). He is the Constable. His precinct has about 350 residents (2R. 106, 109). Morales' first contact with this case was on Sunday night about 9:00 on March 28. Somebody Morales did not know called him and asked if he wanted to pass some marihuana through the checkpoint. The caller asked if Morales could help him. Morales told him, no, because Morales is an officer and does not do that kind of deals (2R. 121-122). About 8:00 p.m. the next day, the same person called again about the same thing: passing some drugs for him. Morales responded the same. Morales does not do that kind of deals (2R. 122). The person hung up. Between 8:00 and 10:00 the next evening, the 30th, he called Morales again. That time,

Morales told him, "I want to see you in person" (2R. 123). Sometimes the caller would say his name was Galindo Barrera, but he never gave the right name. During that third call is when Morales "decided if I can arrest him -- " (2R. 124). Morales wanted to set everything up (2R. 127). Morales told the caller, "Why don't you come over to Rachal. I want to see you at Delicias Cafe" (2R. 127). They were supposed to meet about 10:00 a.m. the next day at the restaurant in Rachal. Agent Tittle was not there at that first meeting. S.J. Barrera or Galindo said, "I have been the fellow who has been calling because I want to pass some marijuana" (2R. 128-129). Morales said he was not too interested in passing marihuana. The caller kept pushing Morales saying, "Do it. Do it. I will pay you and I will do this and I will do that." Morales decided that he could catch him. Morales told him, "Well, when are you coming with marijuana or

something so I can be around here so we can meet again? The other person left after saying, "I will call you tonight." Morales did not hear from him again until he called Morales, saying that he had a friend. That conversation is the one on the tape the jury heard (2R. 129-130). Morales thought if he did this bust of those two, "I will just make a little bit of people see that I was doing my job" (2R. 131). Morales wanted to have them there with the marihuana and the money to have a good case on them" (2R. 133).

Morales insisted that he had attempted to involve the Sheriff in the investigation and that he had tried to telephone the Sheriff several times at work and at home on April 1, and had left a message for him with the dispatcher (2R. 133-135, 163). He did not try to call the Sheriff the next morning, April 2, because he had other business to attend to, but he intended to

meet with the Sheriff at his office after his scheduled 10:00 a.m. meeting with the smugglers (2R. 167). Because he wanted to keep the investigation secret, he wanted to meet with him in person or talk on the telephone, and rejected his police radio as a means of contacting the Sheriff (2R. 169). Although Morales claimed that he did not contact the Sheriff by radio, he actually did contact the Sheriff's Office twice on April 1, the day of his meeting with Tittle at Delicias. The Sheriff's radio dispatcher's log revealed that Morales called in a license plate check on the DEA surveillance van at 4:15 p.m., only minutes after the meeting concluded. He also transmitted a radio message to the dispatcher concerning his whereabouts at home at the end of the day, 8:06 p.m. (2R. 176; 3R. 220, 222).

Instead of getting assistance from other law enforcement agencies, Morales

drove 20 miles outside his precinct to enlist the aid of his long time friend Gonzales to act as a driver in setting up the smugglers for arrest. Morales knew Gonzales was on probation but thought Gonzales could use the reward money for catching the smugglers (2R. 152, 172). Morales' plan was for Gonzales to meet the smugglers at Delicias at 3:00 or 4:00 a.m., Friday morning (2R. 144-145, 148, 167). Gonzales was to detain them at the restaurant while Morales radioed for assistance (2R. 154, 166). Morales believed he would have a stronger case if he caught them with the marihuana (2R. 154-157, 167-168).

Gonzales had worked on ranches in Brooks County and was familiar with the Encino-Rachal area. He knew the ranchers along the highway from Rachal to Rio Grande City, and the foremen and ranch workers on most of the ranches in the area (2R. 197).

SUMMARY OF THE ARGUMENT

This case will be decided on whether its facts require application of the legal principles from Doyle v. Ohio, 426 U.S. 610 (1976) or Anderson v. Charles, 447 U.S. 404 (1980), if, as appellant contends, the numerous unobjected errors below rise to the level of plain error under Federal Rule Criminal Procedure 52(b) and United States v. Young, 470 U.S. 1 (1985).

Appellant submits that viewed in context of the entire record, the district court and prosecutor's improper questioning and the prosecutor's inappropriate jury arguments are such as warrant prompt appellate redress, since those errors are particularly egregious and did seriously affect and undermine the fundamental fairness of the trial and contribute to an obvious miscarriage of justice.

Appellant concludes that the Government has not met its burden of proving that the

district court and the prosecutor's numerous clear violations of Doyle were harmless beyond a reasonable doubt. Appellant has proved said Doyle violations were plain error, because the crucial issue at trial was credibility. The Doyle violations went to the heart of the truth seeking process. The evidence against Morales was not overwhelming, his testimony was not implausible, and the trial court not only gave no cautionary instructions but continually participated in the Doyle violations.

The jury was faced with deciding whether a reasonable doubt was raised as to whether Morales was legitimately working an undercover narcotic investigation of the bad guys who turned out to be DEA Agent Tittle and his informer. Concerning that, part of defense counsel's opening statement to the jury (2R. 102):

> As you hear the evidence, consider what Mr. Tittle has told

> you and what he will tell you, and you will find that up until the point of the arrest, if we were to film this thing and we were able to see how these two people were sparring with each other and we were to film this thing and then stop it right before the arrest at the time that money was exchanged and I was to ask you at that point who are the bad guys and who are the good guys in this case, if you would guess, which way would you go?

There was a miscarriage of justice here. Petitioner's defense that he had decided to constitute himself an undercover drug agent was undermined by the district court and prosecution's interrogations at trial and references made during governmental final argument to the failure of petitioner, at the time of his arrest and being Mirandized, to explain to the arresting officers that he was conducting an undercover operation as Morales did first explain four hours after his arrest. Appellant submits that the jury was unconstitutionally deprived of its right to render a fair verdict by assessing the

credibility of Morales' defense of undercover work with the prejudicial damage done by both judicial and prosecution misconduct.

In these circumstances, Morales requests this Court conclude that plain error occurred and it is not clear beyond a reasonable doubt that the jury would have found Morales guilty of the crime for which he was convicted, absent the district court and the prosecutor's numerous improper interrogations and the prosecutor's improper summation utilizing its own and judicial Doyle and Greenfield errors. Since defense trial counsel failed to object to any of those constitutional errors reversal should follow under Strickland v. Washington, 466 U.S. 668 (1984). Said counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result. But for counsel's errors, there is a

reasonable probability the outcome would have been different with the jury having a reasonable doubt because of Isidro Morales' defense of also working undercover.

ARGUMENT

A. Circuit Judge Smith's Dissent

Petitioner here adopts as part of his argument the dissenting opinion in United States v. Morales, 854 F.2d 61, 63-65 (CA5 1988). It reads (Pet.App. 13-23):

> I respectfully dissent, and would reverse the conviction and remand for a new trial.
>
> The case turns on the brief conversation between defendant and the sheriff, at the point when defendant was arrested. The sheriff asked defendant, "What happened, Isidro?" Defendant replied, "I don't know why these men are bringing me here." He said nothing further. I would hold, contrary to the government's assertion, that defendant's comment either (i) was tantamount to silence, or (ii) was not inconsistent with his trial testimony. In either event, the prosecution's comment on the statement was plain error entitling defendant to a reversal under Doyle v. Ohio, 426 U.S. 610 (1976).
>
> The statement could easily be deemed small-talk or casual

conversation and hence tantamount to silence. If defendant had merely commented on the weather, for example, or had said something inconsequential like, "Hey, how are you doing today, Sheriff?", surely we would not permit the prosecutor or the court to comment upon the fact that defendant did not also assert his innocence. In other words, it makes no sense that the test for whether a defendant is "silent" for purposes of Doyle and Miranda is whether the defendant utters any audible words. It would be illogical to prohibit comment, at trial, on a defendant's absolute silence but to allow comment where a defendant mouths a few fairly meaningless, possibly extraneous words but does not add to those words a protestation of innocence.

Probably the better view, though, of Morales's comment is that, rather than being tantamount to silence, it constitutes a statement that is consistent (or at the very least, not inconsistent) with his trial testimony that he was working undercover. Assume, in another context, a known law enforcement official who in fact is engaged in a coordinated undercover investigation. Suddenly, and unexpectedly, he is arrested by sheriff's deputies. He is taken to the sheriff, who says, "What happened, Joe?" He replies, "I don't know why these men are bringing me here." We would not necessarily expect such a person to proclaim his innocence on the spot or to permit the judge and prosecutor to be able to comment on his "silence" if he did not.

The majority does not reach the question of whether defendant's statement was inconsistent, since the majority concludes that there is no plain error. It suggests that the evidence of guilt was so overwhelming that there is no "probability of a different result," occasioned by the errors in the trial court, "sufficient to undermine confidence in the trial's outcome" (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

Were I to view the evidence de novo, I likely would agree that defendant's story that he was engaged in undercover operations, in the majority's words, "all but defies belief." But the point is that apparently some of the jurors, infected with the comments of the prosecutor and the judge, did not think so.

During its deliberations, the jury sent a note stating (in less than perfect English) "Thet some of us can not a unanimous dissicion on this case. And I don't belive thet it will be possible for us. to do so." [Sic.] Although a unanimous verdict was later reached, it is evidence from the jury's note that it had difficulty in reaching its decision. (Earlier, the jury additionally had asked to re-listen to tapes that had been introduced into evidence.)[1/]

I cannot say with the ease of the majority that, under these circumstances, the prosecutor's and court's improper comments upon the defendant's exercise of his right to silence were harmless. They might very well have tipped the scales in favor of

conviction in this case that apparently was a close one in the eyes of the jury.[2]

Accordingly, I believe there was plain error. The defendant can easily be retried, without the subject prejudicial comments. If the evidence of guilt is as overwhelming as the majority asserts, he in all likelihood will be re-convicted. I respectfully dissent.

1/ The dynamics of the jury deliberations are further shown by affidavits of two jurors filed with the district court after sentence was pronounced. They read as follows:

1. My name is Anna Barrera and I am 21 years old. I served a juror [sic] in The U.S. District Court involving defendant Isidro Morales. At first, my feeling was that Mr. Morales was not guilty but after the judge ordered the jury back into deliberation I felt that we were being pressured by some of the jurors to reach a guilty verdict.

   There was alot [sic] of tension in the jury room because most of the jurors had a long way to drive to go home and they wanted to reach a decision by 5:00 P.M. We reached a guilty verdict but we did not agree.

2. My name is Angela F. Cantu and I served on a federal jury in Brownsville in the case involving Isidro Morales, who was a defendant. I felt I was pressured into making a decision on the case before I was prepared to.. [sic] I felt sick about it afterwards. The other jurors said I couldn't be right but I still felt he was not guilty. I almost was angry because I thought what I had in my mind was right. When we can in with the verdict I still felt he was not guilty. I cried about what had happened. It was very

painful to convict a man I thought was innocent.

The affidavits were attached to the defendant's motion for release pending appeal. Although they apparently were received by the trial judge without objection from the government, their admissibility is questionable under Fed.R.Evid. 606(b). But even without the affidavits, it is obvious from the record that the jury had difficulty arriving at a unanimous verdict.

2/ We may reasonably assume that the questions by the judge himself had a special impact upon the jurors. For example, the following colloquy occurred at trial:

BY MR. GUERRA [the prosecutor]:

Q. So at the time you got arrested, the Sheriff was there and you didn't say anything like, "Sheriff, there is a mistake," or anything like that?

A. No, because he didn't give me any chance. He just come over here and read me the rights.

THE COURT: But that's a friend of yours, right? I mean, you participated in elections in Brooks County, right?

THE WITNESS: Right.

THE COURT: And he has probably come to you and asked you for help in the past with regard

to elections and things like that, right? Sir?

THE WITNESS: How is that?

THE COURT: He has probably come and asked for your support with regards to elections and other things in the past, has he not?

THE WITNESS: Well, he never asked for voters.

THE COURT: But he has come in the past and talked to you about --

THE WITNESS: Oh, yes.

THE COURT: -- either law enforcement or whatever, is that right?

THE WITNESS: Yes, come to my house and drink a coke or so.

THE COURT: And you couldn't feel you could just -- what's his name?

THE WITNESS: Ramiro Castellano.

THE COURT: You couldn't say, "Ramiro, this is a terrible mistake here. I was doing undercover work myself and I was trying to arrest these people." You didn't feel comfortable enough to say that?

THE WITNESS: The reason I didn't ask him is because he just

read the rights and left right away.

THE COURT: After he read the rights to you, he asked you whether you understood that? Isn't that one of the procedures when someone reads your right?

THE WITNESS: Yes.

THE COURT: And when you read somebody their rights, you say something to the effect: "You have the right to remain silent. Any answers to any questions you answer may be used against you in a court of law. You have a right to request an attorney. And you have a right to stop questioning at any point."

Those are the type of rights he read to you?

THE WITNESS: Yes.

THE COURT: He had to wait for you to respond to some of these, is that right? He had to wait for you to say yes when he asked you about your rights?

THE WITNESS: I don't know if I said yes or no, because the man was in a hurry. He just grabbed my arm and put me in the car.

THE COURT: There was some time

there, was there not, where you could have said something, is that correct?

THE WITNESS: Well, maybe.

B. Other Supreme Court Cases

In Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 640-641, 88 L.Ed.2d 623 (1986), a new trial was required on petition under 28 U.S.C. 2254. There, the Court said (footnotes omitted):

> Finally, the Florida Attorney General argues that it is vitally important to be able to present evidence of a defendant's sanity at the time of the offense and shortly thereafter. However, as the dissenting judge in the Florida Court of Appeal recognized in this very case, the State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel. What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized.
>
> In Doyle, we held that Miranda warnings contain an implied promise, rooted in the Constitution, that "silence will carry no penalty." 426

U.S., at 618, 96 S.Ct., at 2245. Our conclusion that it was fundamentally unfair for the Ohio prosecutor to breach that promise by using the defendants' postarrest, post-Miranda warnings silence to impeach their trial testimony requires us also to conclude that it was fundamentally unfair for the Florida prosecutor to breach the officers' promise to respondent by using his postarrest, post-Miranda warnings silence as evidence of his sanity.

In United States v. Hale, 422 U.S. 171, 180-181, 95 S.Ct. 2133, 2138-2139, 45 L.Ed.2d 99 (1975), the Court said:

> Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.
>
> As we have stated before: "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." Shepard v. United States, 290 U.S. 96, 104, 54 S.Ct. 22, 26, 78 L.Ed. 196 (1933). We now conclude that the respondent's silence during police interrogation lacked significant probative value and that

any reference to his silence under such circumstances carried with it an intolerably prejudicial impact.

Accordingly, we hold that under the circumstances of this case it was prejudicial error for the trial court to permit cross-examination of respondent concerning his silence during police interrogation, and we conclude, in the exercise of our supervisory authority over the lower federal courts, that Hale is entitled to a new trial.

In discussing cured attempted Doyle error in Greer v. Miller, ___ U.S. ___, 107 S.Ct. 3102, 3109-3110, ____ L.Ed.2d ____ (1987), the Court said (footnotes omitted):

Although the prosecutor's question did not constitute a Doyle violation, the fact remains that the prosecutor attempted to violate the rule of Doyle by asking an improper question in the presence of the jury. This Court has recognized that prosecutorial misconduct may "so infect[t] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974). To constitute a due process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985)(quoting United States v. Agurs,

427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The Illinois Supreme Court, applying the analysis of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), found that the prosecutor's question was harmless beyond a reasonable doubt. 96 Ill.2d, at 396, 70 Ill.Dec., at 854, 450 N.E.2d, at 327. We thus are convinced that it would find no due process violation under the facts of this case. When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important "as an initial matter to place th[e] remar[k] in context." Darden v. Wainwright, 477 U.S. ___, ___, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). See Donnelly v. DeChristoforo, supra, 416 U.S., at 639, 94 S.Ct., at 1869 (determining whether "remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights"). The sequence of events in this case—a single question, an immediate objection, and two curative instructions—clearly indicates that the prosecutor's improper question did not violate Miller's due process rights. The Illinois Supreme Court's determination that the properly admitted evidence at trial "was sufficient to prove defendant's guilt beyond a reasonable doubt," 96 Ill.2d, at 396, 70 Ill.Dec., at 854, 450 N.E.2d, at 327, further supports this result.

C. Constitutional Error and Harm

This Court recently demonstrated harmless-error analysis in Satterwhite v. Texas, ___ U.S. ___, 108 S.Ct. 1792, ____ L.Ed.2d ____ (1988)[finding of harmful constitutional error required reversal of the death sentence portion of the judgment of state court of criminal appeals, affirming the death sentence] and United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983)[finding of harmless constitutional error required reversal of judgment of court of appeals, ordering a new trial based on the prosecutor's argument, which violated respondents' Fifth Amendment rights under Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)].

D. Other Doyle Plain Error-Incompentency Cases

Additionally petitioner submits that plain error occurred here based on the following cases.

In United States v. Shue, 766 F.2d 1122 (CA7 1985), the court reversed defendant's conviction on certain counts as plain error under Doyle v. Ohio, 426 U.S. 610 (1976) even though defendant "opened the door" to the use of his post arrest silence and his defense attorney failed to object because the government used defendant's post-arrest silence in an obvious reach beyond fair limits to impeach defendant's exculpatory story as a recent fabrication implying that defendant's silence upon arrest was inconsistent with his claim of innocence and was essentially an admission by silence, thus standing the protection of Miranda on its head. In Shue, the defense counsel objected at side bar to the government's use of appellant's refusal to talk with the F.B.I. Defense counsel did not give a specific basis for his objection, did not make a continuing objection, and did not renew the objection at the time of the

precise questions and argument. Nevertheless, the court found plain error, saying id., 766 F.2d at 1125, 1132-1133:

> We hold that the government's comments exceeded the boundaries of fairness and violated due process under Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). We further hold that under the circumstances of this case, the constitutional error was plain, and was not harmless.
>
> * * * * *
>
> We need not decide whether the objection at the side bar constitutes a timely objection, which it may have been, because, even if the objection was not sufficient, we find the error plain.
>
> We may notice an error as plain error under Federal Rule of Criminal Procedure 52(b) if we find reversal necessary to avoid a miscarriage of justice. See United States v. Frady, 456 U.S. 152, 163 & n. 13, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (1982). Errors of constitutional dimension, such as the due process violation here, are more freely noticed than are less serious, non-constitutional errors. See 3A C. Wright, Federal Practice and Procedure § 856, at 342 (1982). Cf. United States v. Silverstein, 732 F.2d 1338, 1349 (7th Cir.1984)(plain error test for non-constitutional error). The appellate courts have held that impermissible use of a defendant's post-arrest silence may be plain error, see, e.g., United States v. Edwards,

576 F.2d 1152, 1154 (5th Cir.1978) (per curiam); United States v. Lopez, 575 F.2d 681, 685 (9th Cir.1978), and we so hold.

Constitutional error is reversible error unless it is harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The burden of proving a constitutional error harmless rests upon the government. Chapman, 368 U.S. at 24, 87 S.Ct. at 828. While the result of a harmless error analysis depends on the circumstances of the particular case, we note that post-arrest silence due process violations often have been held reversible error. See. e.g., United States v. ex rel. Allen v. Franzen, 659 F.2d 745, 748 (7th Cir.1981), cert. denied, 456 U.S. 928, 102 S.Ct. 1975, 72 L.Ed.2d 444 (1982); Williams v. Zahradnick, 632 F.2d 353, 360-65 (4th Cir.1980) (citing cases); Edwards, 576 F.2d at 1155; Morgan v. Hall, 569 F.2d 1161, 1168 (1st Cir.), cert. denied, 437 U.S. 910, 98 S.Ct. 3103, 57 L.Ed.2d 1142 (1978).

In Alston v. Garrison, 720 F.2d 812 (CA4 1983), the defendant appealed from an order of the United States district court denying his petition for a writ of habeas corpus. The court of appeals held that trial counsel's failure to object to

prosecution evidence that defendant had stood on his constitutional rights to remain silent during interrogation denied defendant effective assistance of counsel to a degree that prejudiced the outcome of trial, warranting habeas relief under 28 U.S.C. 2254. The court stated, id., 720 F.2d at 816:

> Few mistakes by criminal defense counsel are so grave as the failure to protest evidence that the defendant exercised his right to remain silent ... Such evidence plants in the mind of the jury the dark suspicion that the defendant had something to hide, and that any alibi which is subsequently proffered is pure fabrication.

In United States ex rel. Smith v. Rowe, 618 F.2d 1204 (CA7 1980), the prosecutor, during both his initial and final closing arguments, commented about defendant's failure to inform law enforcement authorities of his alibi defense. Defense counsel failed to object and defendant was convicted. On habeas corpus appeal, the court held that the prosecutor violated

defendant's constitutional right to due process. In light of fact that evidence presented to the state court was not exceedingly strong, the court could not say that error was harmless. Recognizing that "defense counsel's failure to object at time of prosecutor's closing argument is a factor to be weighed in considering whether or not the prosecutor's remarks are to be considered as improper comments", id., 618 F.2d, at 1211, the court nonetheless found that those closing arguments would naturally and necessarily be taken as a comment on defendant's failure to come forward prior to trial with notice of his alibi defense. The court held petitioner was entitled to habeas corpus relief under 28 U.S.C. 2254.

In United States v. Massey, 687 F.2d 1348, 1353-1354 (CA10 1982), the court addressed a fact situation very similar to Isidro Morales' in the case at bar. With the jury rejecting Massey's defense that he

was working as an undercover narcotics officer at the time in question, the court said (footnotes omitted):

> The use of a defendant's post-arrest silence to impeach an exculpatory story told for the first time at trial violates the Fourteenth Amendment's mandate of due process if the silence follows the giving of Miranda warnings. See Fletcher v. Weir, ___ U.S. ___, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982); Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976). Impeachment on the basis of a defendant's silence following warnings is "fundamentally unfair because Miranda warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him .... Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances." Anderson v. Charles, 447 U.S. 404, 407-08, 100 S.Ct. 2180, 2181-82, 65 L.Ed.2d 222 (1980). Unfortunately, the record does not reveal at what point in time, if ever, Massey was given such warnings. While the appeal in this case was pending, the Supreme Court made clear that due process is not violated by cross-examination on post-arrest silence where a Miranda warning was not given. See Fletcher, ___ U.S. at ___, 102 S.Ct. at 1311-12.
>
> In sum, the receipt of Miranda warnings is determinative of the constitutional issue. Accordingly, we remand this case to the trial court for

an evidentiary hearing to establish whether Massey was informed of his constitutional right to remain silent.

If Massey was properly given his Miranda warnings at the time of his arrest or prior to custodial interrogation, cross-examination and comment by the Government on his silence after the warnings clearly violates the principle set forth in Doyle. Because it is of constitutional dimension, such an error requires a new trial unless we are convinced that the error is harmless beyond a reasonable doubt after assessing the record as a whole. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); see also Williams v. Zadradnick, 632 F.2d 353 (4th Cir. 1980); Deats v. Rodriguez, 477 F.2d 1023 (10th Cir. 1973); United States v. Arnold, 425 F.2d 204 (10th Cir. 1970). Some factors relevant to determining whether the comment is harmless include:

> "1. The use to which the prosecution puts the postarrest silence.
>
> "2. Who elected to pursue the line of questioning.
>
> "3. The quantum of other evidence indicative of guilt.
>
> "4. The intensity and frequency of the reference.
>
> "5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions."

Williams, 632 F.2d at 361-62 (footnotes omitted).

> Although ample evidence showed that Massey had participated in the Missouri trip, this evidence was not inconsistent as a whole with Massey's exculpatory story, had the jury chosen to believe him. By using Massey's post-arrest silence to refute his defense, the Government attacked the heart of his case. Massey was questioned not only about his silence at the time of his arrest, but about his silence at subsequent interrogations, at his initial appearance, at the marshal's office, at the magistrate's office, at the bond hearing, and at the arraignment. On the record in this case, the error cannot be considered harmless. See, e.g., Williams, 632 F.2d at 356-57, 362 n.15; United States v. Meneses-Davila, 580 F.2d 888, 893-95 (5th Cir. 1978); Deats v. Rodriguez, 477 F.2d 1023, 1024-25 (10th Cir. 1973); United States v. Nolan, 416 F.2d 588, 592-94 (10th Cir.), cert. denied, 396 U.S. 912, 90 S.Ct. 227, 24 L.Ed.2d 187 (1969). If Massey's silence followed Miranda warnings, a new trial is mandated.

E. Government's Egregious Rebuttal

The factual context in the instant case is much worse than that in United States v. Hale, 422 U.S 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). There, the Court described the

facts, saying, id., 422 U.S. at 172-174, 95 S.Ct. 2134-2136:

> Respondent was tried and convicted of robbery in the District Court for the District of Columbia. During cross-examination at trial the prosecutor asked respondent why he had not given the police his alibi when he was questioned shortly after his arrest. The trial court instructed the jury to disregard the colloquy but refused to declare a mistrial.
>
> * * * * *
>
> In an effort to impeach Hale's explanation of his possession of the money, the prosecutor caused Hale to admit on cross-examination that he had not offered the exculpatory information to the police at the time of his arrest:
>
> > "Q. Did you in any way indicate [to the police] where that money came from?
> >
> > "A. No, I didn't.
> >
> > "Q. Why not?
> >
> > "A. I didn't feel that it was necessary at the time."

Thus procedurally in Hale reversal occurred even though a timely objection was sustained, instruction given but mistrial denied. The two unconstitutional questions

by the Hale prosecutor required reversal. Surely, the numerous combined judicial and prosecution assaults on Morales' right to remain silent require the same result here as in Hale.

Besides the Doyle errors herein, Morales' post-arrest silence was also used as affirmative proof in the government's rebuttal case. Those constitutional Greenfield violations are especially egregious because it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter breach that promise by using silence to overcome a defendant's plea of innocence. See Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 639, 88 L.Ed.2d 623 (1986).

The first Greenfield errors occurred after being recalled by the government, DEA Agent Tittle responded to the prosecutor in

this rebuttal colloquy (3R. 213-215) (emphasis added):

Q Mr. Tittle, could you give us the time more or less when the defendants, Mr. Morales and Mr. Gonzales, were arrested?

A It was approximately 10:30 a.m. between 10:30 and 11:00 a.m. on April 1, 1987 -- April 2nd, excuse me.

Q What happened to them after they were arrested?

A We were at Mr. Morales' residence for approximately ten minutes. They were both transported back to the McAllen district office in McAllen for processing where we questioned each one of them, referenced their names --

MR. NINO: I will object to being unresponsive to the question. If he would just limit --

THE COURT: He asked him what happened then.

MR. LINDENMUTH: If I may address the Court. He is going into a narrative, and this testimony was covered --

THE COURT: Well, it would have sped things up. Mr. Guerra, now ask it question by question.

BY MR. GUERRA:

Q They were transported back to McAllen?

A Yes.

Q And you said something about they were processed?

A Yes.

Q What does the processing entail?

A Processing at our office entails taking fingerprints, photographs and asking them personal history information, such as relatives, addresses, telephone numbers, height, weight, color of eyes, hair.

Q Was that done to each of these two individuals?

A Yes.

Q Is it normally done one routine right after the other or is there a waiting period of time and so forth?

A There are several waiting periods while secretaries type up information, and we have to get this information to the Magistrate in McAllen.

Q What time did you finally take them to the Magistrate in McAllen?

A Approximately 3:00 p.m. that afternoon.

Q From the time -- as you heard the testimony, that was the first time that Mr. Morales indicated to you that he was working undercover, at that time when you were taking him to the Magistrate's office?

A When I put him in my car and was driving him to the Magistrate's office, Mr. Morales informed me he was making

an undercover case against me at the time.

Q How long from the time of his arrest was that now?

A Four to five hours.

Q He had other opportunities to convey this information to you?

A Numerous opportunities.

The second Greenfield errors occurred as government's next rebuttal witness Brooks County Sheriff Ramiro Castellano (2R. 217-218) responded to the prosecutor as follows (2R. 223-225):

Q Sheriff Castellano, were you present when the defendants Isidro Morales and Gilberto Gonzales were arrested, sir?

A Yes, sir.

Q Where did that take place at?

A At Mr. Morales' residence.

Q Do you know who read them their rights?

A There was a federal agent that read them their rights in English, and I read them their rights in Spanish.

Q Did you ask them whether they understood it?

A Yes, sir.

Q Did they appear to understand what you asked them?

A They answered in the affirmative.

Q Upon arriving at the location, did you have any other communications with either Mr. Morales or Mr. Gonzales?

A Yes, sir.

Q With whom and what was said?

A When I stepped out of the vehicle, I asked Mr. Morales, "Que paso, Isidro?"

COURT INTERPRETER: "What happened, Isidro?"

BY MR. GUERRA:

Q You said it in Spanish?

A Yes.

Q Would you say it in Spanish and then translate it?

A I asked him, "Que paso, Isidro?" And "What happened, Isidro?"

Q What did he say?

A "No se porque estos hombres me trajeron aca."

COURT INTERPRETER: "I don't know why these men are bringing me here."

BY MR. GUERRA:

Q Did he say anything to you at that time concerning an undercover operation he was involved in?

A No, he didn't.

THE COURT: Did you in any way attempt to cut him off or not give him an opportunity to speak to you, Mr. Castellano?

THE WITNESS: No, sir. As a matter of fact I initiated the conversation.

THE COURT: And he didn't volunteer anything else?

THE WITNESS: No sir, just when I asked him --

THE COURT: Did you appear in any way to be rude to him or tell him not to speak to you or tell him you were too busy to have a discussion with him?

THE WITNESS: No, sir.

BY MR. GUERRA:

Q Did Mr. Gonzales ask something of you, sir?

A Yes, sir.

Q What did he do?

A He asked me to call his sister or sister-in-law. I don't recall which.

Q Did he make any indication to you that there was a mistake, it was an undercover operation?

A No, sir, he did not.

THE COURT: Did you call his sister or sister-in-law?

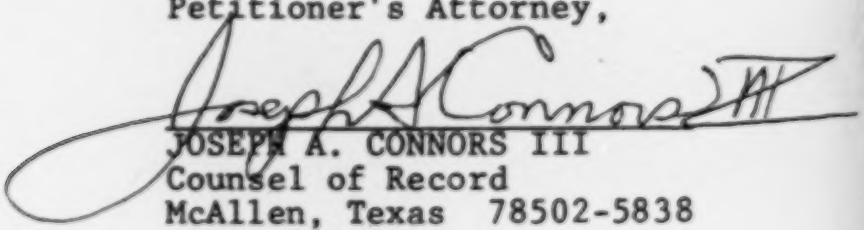
THE WITNESS: No, sir, I answered -- told him that he could -- that the gentleman would let him call when they got to the Valley.

CONCLUSION

For all the foregoing reasons, petitioner respectfully urges that this Court grant this petition, reverse the judgments below and remand this case to the district court for retrial.

DATE: November 25th, 1988.

Respectfully submitted by
Petitioner's Attorney,



JOSEPH A. CONNORS III
Counsel of Record
McAllen, Texas 78502-5838
(512) 687-8217

88-883
NO.

Supreme Court, U.S.
FILED
NOV 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

ISIDRO MORALES,
Plaintiff-Appellee

VS.

UNITED STATES OF AMERICA,
Defendant-Appellant

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH A. CONNORS III
Counsel of Record
804 Pecan Blvd.
McAllen, Texas 78502-5838
(512) 687-8217

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

	Page
TABLE OF CONTENTS	2
CIRCUIT COURT'S JUDGMENT	3
CIRCUIT COURT'S OPINION	4
CIRCUIT COURT'S REHEARING DENIAL	24
DISTRICT COURT'S JUDGMENT.....	26
INDICTMENT	29
PROBLEMATIC INTERROGATION I	31
PROBLEMATIC INTERROGATION II	39
PROBLEMATIC INTERROGATION III	42
PROBLEMATIC INTERROGATION IV	45
PROBLEMATIC SUMMATION I	49
PROBLEMATIC SUMMATION II	59

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2858

D.C. Docket No. B-CR-87-182

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ISIDRO MORALES
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before GEE, DAVIS, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

August 19, 1988

SMITH, Circuit Judge, dissenting.

ISSUED AS MANDATE: Oct. 6, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-2858

UNITED STATES OF AMERICA,
Defendant-Appellant

versus

ISIDRO MORALES,
Plaintiff-Appellee

Appeal from the United States District Court
For the Southern District of Texas

(August 19, 1988)

Before GEE, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

The issues on this appeal arise from references made at trial to the failure of the appellant, at the time of his arrest, to explain to the arresting officers that he was conducting an undercover operation as he later claimed. Appellant Morales contends

that these references infringe the rule of Doyle v. Ohio, 426 U.S. 610 (1976).

Facts

Appellant Isidro Morales was Constable of Precinct 3, Brooks County, Texas. Undercover DEA Agent Tittle, acting on a confidential tip that Morales was corrupt, approached Morales indirectly by means of a taped telephone conversation and solicited his help in smuggling drugs. Morales initially appeared reluctant but eventually agreed to help. Morales enlisted the aid of an accomplice and arranged to transport a small "test load" of marijuana.

On the day before the scheduled test run, Agent Tittle and his informant again met with Morales. Agent Tittle tried to give an agreed upon $500 to Morales who said, "No, don't give it to me. Give it to

[my accomplice] . . ."[1/] Agent Tittle nevertheless gave Morales the cash. Morales turned and gave it to his accomplice. As Agent Tittle left this meeting he signaled his collegues, who moved in to arrest Morales and his accomplice.

The Brooks County Sheriff, with whom Morales was acquainted, accompanied the federal agents. Sheriff Castellano stopped his vehicle and asked Morales in Spanish, "What happened, Isidro?" Morales replied in Spanish, "I don't know why these men are bringing me here." Morales said nothing further. Morales received Miranda warnings, and though the record is unclear we shall assume that they were given before

[1/] The accomplice was on probation for a conviction of stealing guns.

Castellano's question. Four to five hours after the arrest, Morales informed the DEA agent that he had been conducting his own undercover investigation and had agreed to aid in the smuggling scheme because he believed that the agent and the informant were drug traffickers.

At trial, Morales maintained that he was involved in the smuggling scheme in an undercover capacity, attempting to arrest Agent Tittle and the informant. He also presented an entrapment defense. The prosecutor contended that Morales contrived his "undercover investigation" defense during the four-hour period after his arrest. The government relied on Morales's post-arrest silence to support this theory, and both the prosecutor and the trial judge questioned him regarding it without objection by the defense.

Analysis

Doyle v. Ohio, 426 U.S. 610 (1976) prohibits the use of post-arrest, post-Miranda silence to impeach a defendant's trial testimony. In Doyle, when defendant was arrested on drug charges he said "I don't know what you are talking about" or "you got to be crazy." 426 U.S. at 614 n. 5; id. at 622 n.4 (Stephens (sic), J., dissenting). At trial, Doyle testified that he had been framed. The state introduced his post-arrest "silence" to impeach his testimony, arguing that Doyle's post-arrest failure to assert his innocence undermined his trial testimony. The Court held that this violated the fifth amendment because the silence is presumed to be an exercise of Miranda rights.

Doyle and its progeny, however, recognize that if a post-Miranda statement is inconsistent with defendant's trial

testimony, the inconsistent statement and subsequent silence or failure to explain the statement is admissible to impeach the defendant. See id. at 617 n. 7; Anderson v. Charles, 447 U.S. 404, 408 (1980); Brogdon v. Butler, 838 F.2d 776, 779 (5th Cir. 1988); Lofton v. Wainwright, 620 F.2d 74, 78 (5th Cir. 1980). Once a defendant makes a statement, it can no longer be presumed that his silence is based on Miranda.

The government contends, in response to Morales's claim of a Doyle violation, that Morales's statement was inconsistent with his trial testimony that he was working undercover. We need not address the contention, however, as no objection was made to the references and they do not amount to plain error.

Pursuant to the plain error doctrine, we may notice serious defects in trial

proceedings even though they were not brought to the trial court's attention. Rule 52(b), Fed.R.Crim.P. Even so, the Supreme Court has made it clear that the doctrine is not lightly to be applied:

> The plain-error doctrine of Federal Rule of Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement. The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Any unwarranted extension of this exacting definition of plain error would skew the Rule's "careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly rederessed."

United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046-47, 84 L.Ed.2d 1 (1985)

(citations and footnotes omitted).

We see no miscarriage of justice here. The evidence of Agent Tittle, if credited by the jury, was damning. Taken together with the taped conversation, it was such as to overwhelm Morales's unlikely story that he -- essentially a process-server -- had suddenly decided to constitute himself an undercover drug agent.

The same is true of Morales's claim that counsel was ineffective for failure to object to the comments on his silence and for presenting both a claim of innocence and an entrapment defense. Even assuming that these were professionally unreasonable errors, it remains necessary for reversal that there also be the probability of a different result resulting from them sufficient to undermine confidence in the trial's outcome. Strickland v. Washington, 466 U.S. 668, 694 (1984). We think no such

probability has been shown. Morales's tale that he had suddenly, without effectively coordinating with any other law enforcement officer or agency, determined to renounce his essentially housekeeping law-enforcement job and embark on an undercover enterprise trapping dope smugglers in company with his probationer friend all but defies belief to begin with. Ranged against the other record evidence, it might have served as the basis for a jury pardon; but little more can have been hoped for from it.

AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

I respectfully dissent, and would reverse the conviction and remand for a new trial.

The case turns on the brief conversation between defendant and the sheriff, at the point when defendant was arrested. The sheriff asked defendant, "What happened, Isidro?" Defendant replied, "I don't know why these men are bringing me here." He said nothing further. I would hold, contrary to the government's assertion, that defendant's comment either (i) was tantamount to silence, or (ii) was not inconsistent with his trial testimony. In either event, the prosecution's comment on the statement was plain error entitling defendant to a reversal under Doyle v. Ohio, 426 U.S. 610 (1976).

The statement could easily be deemed small-talk or casual conversation and hence tantamount to silence. If defendant had merely commented on the weather, for example, or had said something inconsequential like, "Hey, how are you doing today, Sheriff?", surely we would not permit the prosecutor or the court to comment upon the fact that defendant did not also assert his innocence. In other words, it makes no sense that the test for whether a defendant is "silent" for purposes of Doyle and Miranda is whether the defendant utters any audible words. It would be illogical to prohibit comment, at trial, on a defendant's absolute silence but to allow comment where a defendant mouths a few fairly meaningless, possibly extraneous words but does not add to those words a protestation of innocence.

Probably the better view, though, of Morales's comment is that, rather than being tantamount to silence, it constitutes a statement that is consistent (or at the very least, not inconsistent) with his trial testimony that he was working undercover. Assume, in another context, a known law enforcement official who in fact is engaged in a coordinated undercover investigation. Suddenly, and unexpectedly, he is arrested by sheriff's deputies. He is taken to the sheriff, who says, "What happened, Joe?" He replies, "I don't know why these men are bringing me here." We would not necessarily expect such a person to proclaim his innocence on the spot or to permit the judge and prosecutor to be able to comment on his "silence" if he did not.

The majority does not reach the question of whether defendant's statement was inconsistent, since the majority

concludes that there is no plain error. It suggests that the evidence of guilt was so overwhelming that there is no "probability of a different result," occasioned by the errors in the trial court, "sufficient to undermine confidence in the trial's outcome" (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

Were I to view the evidence de novo, I likely would agree that defendant's story that he was engaged in undercover operations, in the majority's words, "all but defies belief." But the point is that apparently some of the jurors, infected with the comments of the prosecutor and the judge, did not think so.

During its deliberations, the jury sent a note stating (in less than perfect English) "Thet some of us can not a unanimous dissicion on this case. And I don't belive thet it will be possible for

us. to do so." [Sic.] Although a unanimous verdict was later reached, it is evidence from the jury's note that it had difficulty in reaching its decision. (Earlier, the jury additionally had asked to re-listen to tapes that had been introduced into evidence.)[1/]

I cannot say with the ease of the majority that, under these circumstances, the prosecutor's and court's improper comments upon the defendant's exercise of his right to silence were harmless. They might very well have tipped the scales in favor of conviction in this case that apparently was a close one in the eyes of the jury.[2/]

Accordingly, I believe there was plain error. The defendant can easily be retried, without the subject prejudicial comments. If the evidence of guilt is as overwhelming as the majority asserts, he in all

likelihood will be re-convicted. I respectfully dissent.

1/ The dynamics of the jury deliberations are further shown by affidavits of two jurors filed with the district court after sentence was pronounced. They read as follows:

1. My name is Anna Barrera and I am 21 years old. I served a juror [sic] in The U.S. District Court involving defendant Isidro Morales. At first, my feeling was that Mr. Morales was not guilty but after the judge ordered the jury back into deliberation I felt that we were being pressured by some of the jurors to reach a guilty verdict.

   There was alot [sic] of tension in the jury room because most of the jurors had a long way to drive to go home and they wanted to reach a decision by 5:00 P.M. We reached a guilty verdict but we did not agree.

2. My name is Angela F. Cantu and I served on a federal jury in Brownsville in the case involving Isidro Morales, who was a defendant. I felt I was pressured into making a decision on the case before I was prepared to.. [sic] I felt sick about it afterwards. The other jurors said I couldn't be right but I still felt he was not

> guilty. I almost was angry because I thought what I had in my mind was right. When we can in with the verdict I still felt he was not guilty. I cried about what had happened. It was very painful to convict a man I thought was innocent.

The affidavits were attached to the defendant's motion for release pending appeal. Although they apparently were received by the trial judge without objection from the government, their admissibility is questionable under Fed.R.Evid. 606(b). But even without the affidavits, it is obvious from the record that the jury had difficulty arriving at a unanimous verdict.

2/ We may reasonably assume that the questions by the judge himself had a special impact upon the jurors. For example, the following colloquy occurred at trial:

> BY MR. GUERRA [the prosecutor]:
>
> Q. So at the time you got arrested, the Sheriff was there and you didn't say anything like, "Sheriff, there is a mistake," or anything like that?
>
> A. No, because he didn't give me any chance. He just come over here and read me the rights.

THE COURT: But that's a friend of yours, right? I mean, you participated in elections in Brooks County, right?

THE WITNESS: Right.

THE COURT: And he has probably come to you and asked you for help in the past with regard to elections and things like that, right? Sir?

THE WITNESS: How is that?

THE COURT: He has probably come and asked for your support with regards to elections and other things in the past, has he not?

THE WITNESS: Well, he never asked for voters.

THE COURT: But he has come in the past and talked to you about --

THE WITNESS: Oh, yes.

THE COURT: -- either law enforcement or whatever, is that right?

THE WITNESS: Yes, come to my house and drink a coke or so.

THE COURT: And you couldn't feel you could just -- what's his name?

THE WITNESS: Ramiro Castellano.

THE COURT: You couldn't say, "Ramiro, this is a terrible mistake here. I was doing undercover work myself and I was trying to arrest these people." You didn't feel comfortable enough to say that?

THE WITNESS: The reason I didn't ask him is because he just read the rights and left right away.

THE COURT: After he read the rights to you, he asked you whether you understood that? Isn't that one of the procedures when someone reads your right?

THE WITNESS: Yes.

THE COURT: And when you read somebody their rights, you say something to the effect: "You have the right to remain silent. Any answers to any questions you answer may be used against you in a court of law. You have a right to request an attorney. And you have a right to stop questioning at any point."

Those are the type of rights he read to you?

THE WITNESS: Yes.

THE COURT: He had to wait for you to respond to some of these, is that right? He had to wait for you to say yes when he asked you about your rights?

THE WITNESS: I don't know if I said yes or no, because the man was in a hurry. He just grabbed my arm and put me in the car.

THE COURT: There was some time there, was there not, where you could have said something, is that correct?

THE WITNESS: Well, maybe.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-2858

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ISIDRO MORALES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 8-19-88, 5 Cir., 198_, ____F.2d___)

(September 26, 1988)

Before GEE, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

ENTERED FOR THE COURT:
/s/ Thomas Gibbs Gee
United States Circuit Judge
9/23/88

United States of America vs. ISIDRO MORALES DEFENDANT	United States District Court for the SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION DOCKET NO. B-87-182-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987

COUNSEL

X WITH COUNSEL Roberto Nino

PLEA

X NOT GUILTY on April 30, 1987.

FINDING & JUDGMENT

There being a verdict of

X NOT GUILTY. Defendant is discharged on Count 2.

X GUILTY. on Count 1 on 06/12/87.

Defendant has been convicted as charged of the offense(s) of conspiracy to possess, with intent to distribute, a quantity of marihuana, in an amount less than 50 kilograms, in violation of Sections 846, 841(a)(1), and 841(b)(1)(D), Title 21, United States Code, on Count 1 of the Indictment.

SENTENCE OR PROBATION ORDER	The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years. It is hereby ordered that the defendant, having been sentenced in the above case to the custody of the Attorney General, surrender himself to the Attorney General or his authorized representative by reporting to the United States Marshal for the Southern District of Texas, Brownsville Division, 3rd Floor, Federal Court House Building in Brownsville, Texas by 12:00 Noon on August 7, 1987.
SPECIAL CONDITIONS OF PROBATION	The Court further imposes a $50.00 special monetary assessment pursuant to 18 U.S.C. 3013.
ADDITIONAL CONDITIONS OF PROBATION	In addition to the special conditions of probation imposed above, it is hereby ordered that the general

conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

APPROVED AS TO FORM:
/s/ Alfred Crixell

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
X U.S. District Judge
/s/ Ricardo H. Hinojosa
Honorable Ricardo H. Hinojosa
Date 7/28/87

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA *

vs * CR. NO. B-87-182

ISIDRO MORALES *
GILBERTO GONZALES, JR. *

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT 1

That from on or about April 1, 1987, to on or about April 2, 1987, within the Southern District of Texas, and elsewhere within the jurisdiction of this Court, ISIDRO MORALES and GILBERTO GONZALES, JR. knowingly and intentionally did combine, conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute a quantity of marihuana in an amount less than 50 kilos, a controlled substance under

Schedule I of the Controlled Substances Act of 1970, in violation of Sections 846, 841(a)(1), and 841(b)(1)(D), Title 21, United States Code.

COUNT 2

That on or about April 2, 1987, within the Southern District of Texas and within the jurisdiction of this Court, ISIDRO MORALES did knowingly and intentionally use or carry a firearm, to-wit: a 45 caliber automatic, Colt Government Model, serial number 21281G70, during the commission of a drug trafficking crime as charged in Count 1 of the indictment, in violation of Section 924(c)(1), Title 18, United States Code.

A TRUE BILL:

/S/ Jenny Lee Garza
FOREMAN OF THE GRAND JURY

HENRY K. ONCKEN
UNITED STATES ATTORNEY

/S/ Robert L. Guerra
Assistant United States Attorney

PROBLEMATIC INTERROGATION I (2R. 138-144)

BY MR. NINO (Direct exam of Petitioner):

A Well, I was going to go over there and talk to them.

Q Talk to who?

A The Sheriff.

Q And what happened the next day?

A That's when they called that they were going over there.

Q Is that when they were going to take the money?

A Yes.

Q And did they arrest you at that time?

A Yes.

Q But then the Sheriff showed up?

A Yes.

A Well, like Mr. Tittle said awhile ago, when you are going to set a trap you need to say lies. I told him that the man that was going to be hired needed $500 to check on some people to open gates, or they are going to pass the car or something like that.

THE COURT: Mr. Morales, Agent Tittle arrested you or who?

THE WITNESS: It was another. He was there, too.

THE COURT: Other DEA agents?

THE WITNESS: Yes.

THE COURT: Did the Brooks County Sheriff come with them?

THE WITNESS: Yes.

THE COURT: Did you mention to Agent Tittle or the other agents or the Brooks County Sheriff you were working undercover and this was a terrible mistake and you were trying to get these people?

THE WITNESS: They didn't give me a chance.

THE COURT: You didn't have an opportunity when you were arrested to say, "I am sorry. This is a mistake. I was conducting an investigation"?

THE WITNESS: They didn't give me a chance to talk.

THE COURT: You were there standing. Didn't you scream it at them?

THE WITNESS: No, they just went over there and took the pistol out and said, "Turn around. You are under arrest."

THE COURT: They gave you your rights?

THE WITNESS: Yes.

THE COURT: They didn't ask you any questions?

THE WITNESS: No.

THE COURT: Not one question? They asked you information about your name, did they not, or citizenship or address?

THE WITNESS: No.

THE COURT: Didn't you fill out a form at one point?

THE WITNESS: Right there, no.

THE COURT: But you filled one out in the DEA headquarters in McAllen or where?

THE WITNESS: Yes, when I come over here.

THE COURT: Did the Brooks County Sheriff come over to McAllen?

THE WITNESS: I don't know. I didn't see him again.

THE COURT: At no point did you ever tell them you were working under cover and this was a terrible mistake?

THE WITNESS: They didn't give me a chance to tell them. I tried to tell them after that.

THE COURT: On that day you tried to tell Agent Tittle?

THE WITNESS: Yes, sir.

THE COURT: But at what point did you try to tell Agent Tittle that?

THE WITNESS: When he was taking me over to the Judge.

THE COURT: That was on the same day?

THE WITNESS: Yes.

THE COURT: What did you tell Agent Tittle?

THE WITNESS: That I was trying to bust them. And it come the other way.

THE COURT: And this was how long after your arrest?

THE WITNESS: About 2:00 or 3:00 o'clock when they took me. I don't remember what time it was. When they took me over.

THE COURT: You had been arrested at what time?

THE WITNESS: About 10:30.

THE COURT: Go ahead, Mr. Nino.

BY MR. NINO:

Q And you were on your way to McAllen when you told Mr. Tittle that you were trying to arrest them?

A No.

Q When was it?

A When somebody else took me and him over to McAllen. He and the other boy was driving another car.

Q He and another person were driving another car?

A Yes, the one that was talking on the phone. They were driving another car.

Q Now, so you did not tell Agent Tittle that you were going to bust them?

A No, sir.

Q Who did you tell then? Do you remember the name of the fellow?

A No, I didn't tell him anything. We couldn't talk, because he wanted to talk, and that other boy say, "Shut up." So we never did talk on the way over to McAllen. So when --

Q When he wanted to talk, you saw the other agent tell him to shut up?

A Yes, I heard that.

Q Seeing that, did you feel you could talk?

A Well I never did talk about anything.

Q Were you afraid to speak up?

A No, I wasn't afraid, but once they had me tied up and everything --

Q You were not afraid to talk?

A No, sir.

Q Why didn't you talk? Why didn't you tell them this?

A They didn't ask me anything until they took us to the Judge. That's when I told him.

THE COURT: But you mean you were under arrest?

THE WITNESS: Yes.

THE COURT: Weren't you concerned enough to say, "I am sorry, but I shouldn't be under arrest because this was -- I was just investigating you all"?

THE WITNESS: Well, they didn'y (sic) give me any chance.

THE COURT: But you are saying you made this trip from Encino or Rachal to Edinburg or McAllen and you were in a vehicle with them and you never -- or when they immediately arrested you, you never once said that?

THE WITNESS: Like I say, he tries to talk and one of the men say, "Shut up." So it was no use for me to talk.

THE COURT: But you weren't afraid to talk, were you?

THE WITNESS: Oh, no.

BY MR. NINO:

Q Now, you stated something to the effect that something happened on your way to McAllen to see the Judge. And I am not very clear on that. Did you tell someone on the way to the Judge that you were trying to bust them?

A Me and Beto was there, and he took us over there to the J.P. and --

THE COURT: Was that the J.P. or was that Magistrate Susan Williams?

THE WITNESS: Susan.

THE COURT: Williams?

THE WITNESS: Yes. I told him and -- I don't remember what he told me. He say we take you to court and the Judge would like to here this.

BY MR. NINO

Q Would like to what?

A To hear this case.

Q And what did you say?

A That I was trying to bust them.

Q You told Mr. Tittle that very thing?

A Yes. sir.

Q And that was on the way to the Judge?

A Yes.

Q Was Gilberto with you at the time that you told him?

A Yes.

Q Was there anybody else?

A No, sir.

Q This thing about needing the money to pay some of the people that worked on the gates and land owners or whatever, was there any truth to that?

A No, sir.

Q Did you get in touch with any of those people to talk to them and tell them, "I am going to need your help"?

A No, sir.

Q Did you pay anybody in that area any money?

A No, sir.

Q How was your plan supposed to work in order to bust them? Tell the jury how your plan was going to work?

PROBLEMATIC INTERROGATION II (2R. 174-176)

BY MR. GUERRA (Cross exam of Petitioner):

Q So at the time you got arrested, the Sheriff was there and you didn't say anything like, "Sheriff, there is a mistake," or anything like that?

A No, because he didn't give me any chance. He just come over here and read me the rights.

THE COURT: But that's a friend of yours, right. I mean, you participated in elections in Brooks County, right?

THE WITNESS: Right.

THE COURT: And he has probably come to you and asked you for help in the past with regard to elections and things like that, right? Sir?

THE WITNESS: How is that?

THE COURT: He has probably come and asked you for your support with regards to elections and other things in the past, has he not?

THE WITNESS: Well, he never asked for voters.

THE COURT: But he has come in the past and talked to you about --

THE WITNESS: Oh, yes.

THE COURT: -- either law enforcement or whatever, is that right?

THE WITNESS: Yes, come to my house and drink a coke or so.

THE COURT: And you couldn't feel you could just -- what's his name?

THE WITNESS: Ramiro Castellano.

THE COURT: You couldn't say, "Ramiro, this is a terrible mistake here. I was doing undercover work myself and I was trying to arrest these people." You didn't feel comfortable enough to say that?

THE WITNESS: The reason I didn't ask him is because he just read the rights and left right away.

THE COURT: After he read the rights to you, he asked you whether you understood that? Isn't that one of the procedures when someone reads your right?

THE WITNESS: Yes.

THE COURT: And when you read somebody their rights, you say something to the effect: "You have the right to remain silent. Any answers to any questions you answer may be used against you in a court of law. You have a right to request an attorney. And you have a right to stop the questioning at any point."

Those are the type of rights he read to you?

THE WITNESS: Yes.

THE COURT: He had to wait for you to resopnd (sic) to some of these, is that right? He had to wait for you to say yes when he asked you about your rights?

THE WITNESS: I don't know if I said yes or no, because the man was in a hurry. He just grabbed me by the arm and put me in the car.

THE COURT: There was some time there, was there not, where you could have said something, is that correct?

THE WITNESS: Well, maybe.

THE COURT: Go ahead, Mr. Guerra.

PROBLEMATIC INTERROGATION III (3R. 224-226)

Q Upon arriving at the location, did you have any other communications with either Mr. Morales or Mr. Gonzales?

A Yes, sir.

Q With whom and what was said?

A When I stepped out of the vehicle, I asked Mr. Morales, "Que paso, Isidro?"

COURT INTERPRETER: "What happened, Isidro?"

BY MR. GUERRA (Direct exam of Sheriff):

Q You said it in Spanish?

A Yes.

Q Would you say it in Spanish and then translate it?

A I asked him, "Que paso, Isidro?" And "What happened, Isidro?"

Q What did he say?

A "No se porque estos hombres me trajeron aca."

COURT INTERPRETER: "I don't know why these men are bringing me here."

BY MR. GUERRA:

Q Did he say anything to you at that time concerning an undercover operation he was involved in?

A No, he didn't.

THE COURT: Did you in any way attempt to cut him off or not give him an opportunity to speak to you, Mr. Castellano?

THE WITNESS: No, sir. As a matter of fact I initiated the conversation.

THE COURT: And he didn't volunteer anything else?

THE WITNESS: No sir, just when I asked him --

THE COURT: Did you appear in any way to be rude to him or tell him not to speak to you or tell him you were too busy to have a discussion with him?

THE WITNESS: No, sir.

BY MR. GUERRA:

Q Did Mr. Gonzales ask something of you, sir?

A Yes, sir.

Q What did he do?

A He asked me to call his sister or sister-in-law. I don't recall which.

Q Did he make any indication to you that there was a mistake, it was an undercover operation?

A No, sir, he did not.

THE COURT: Did you call his sister or sister-in-law?

THE WITNESS: No, sir, I answered -- told him that he could -- that the gentleman would let him call when they got to the Valley.

MR. GUERRA: Pass the witness, Your Honor.

THE COURT: Mr. Nino?

PROBLEMATIC INTERROGATION IV (2R 188-191)

BY MR. LINDENMUTH (Direct exam of co-defendant Gonzalez):

Q The Judge was talking about what went on, reading the rights to Mr. Morales. Why don't you tell the people what happened after you were arrested by Mr. Tittle. What did the other agents do to you and Mr. Morales?

A Well, I don't know if any of the people have been arrested by the narcos, but they don't let you talk. They read you your rights,and you keep your mouth shut, and that's it.

Q Did they tell you to do that?

A Oh, hell yeah.

Q Did Mr. -- Mr. Tittle said he didn't have a gun. But did anybody else have guns on you?

A All of them. It was just like the Durango Kid. Everybody came out.

Q Were you afraid?

THE COURT: They didn't ask you any questions, Mr. Gonzales?

THE WITNESS: No, they did not.

THE COURT: The narcotics agents arrested you and didn't ask you one question?

THE WITNESS: They just searched me and took the $500 out of my pocket and handcuffed me.

THE COURT: They didn't ask you for any information or they didn't ask you if you understood your rights or anything like that?

THE WITNESS: Oh, yes. That, yes. But otherwise --

THE COURT: Did you volunteer to them you were helping Constable Morales with regard to this operation?

THE WITNESS: Pero, they don't let you talk, Your Honor.

THE COURT: Do you know the Sheriff of Brooks County?

THE WITNESS: Uh-huh.

THE COURT: Do you know the Sheriff of Brooks County?

THE WITNESS: Castellano, yes.

THE COURT: Was he present there during this arrest?

THE WITNESS: He was there at the time, but he left.

THE COURT: Did you tell him anything about you being involved in this undercover operation?

THE WITNESS: Mr. Castellano, he don't understand -- he don't even talk to me.

THE COURT: He doesn't understand what?

THE WITNESS: I told him to make a phone call for me at the time.

THE COURT: Who did you tell him to call?

THE WITNESS: I told him to call my sister-in-law.

THE COURT: You had time to tell the Sheriff to call your sister-in-law. Why didn't you tell the Sheriff that you were involved in a law enforcement capacity with Mr. Morales?

THE WITNESS: Because they didn't give me a chance, Your Honor.

THE COURT: Well, you did tell him to call your sister-in-law, is that right?

THE WITNESS: Pero, he shook his head and that's all the Sheriff did. That's the only thing he knows how to do.

THE COURT: Go ahead, Mr. Lindenmuth.

BY MR. LINDENMUTH:

Q Mr. Gonzales, did you have any idea you were going to break the law?

A Well, yes, I had an idea I was going to break the law, yes, because I was going to help Mr. Morales. But I didn't break the law by helping a

lawman catch somebody else with the dope. Do you understand?

Q In other words, you had your faith in this man?

A Yes.

Q And you are not a dope smuggler as Mr. Tittle would like to describe you, are you?

A No, sir.

Q You don't have any marijuana or any other drug arrests or convictions, do you?

A Not that I know of.

THE COURT: You have never been arrested before by a narcotics officer, is that right?

THE WITNESS: No. This is the first time.

MR. LINDENMUTH: That's it. Pass the witness.

PROBLEMATIC SUMMATION I (3R. 238, 243-251)
(Emphasis added)

MR. GUERRA: If it please the Court, Mr. Nino, Mr. Lindenmuth, ladies and gentlemen of the jury. Before I start I would like to take this time and opportunity to thank the jury for their time and attention. Even though I know you don't feel you have a choice in the matter, we do want to thank you for being here, because it's very important to the defendant.

You are here to decide their guilt or innocence. It's also very important for the American judicial system to take people like yourselves who will take time out from their jobs and their work and their family and sit in judgment and listen to the facts and make the decision based on the law and the facts given and heard before you, not on sympathy and not on emotion, because you are not supposed to decide this case based on sympathy or feeling for the defendant or feeling bad about his family.

Likewise, you are not supposed to decide this because you hate the defendant or you don't like the way he looks or the way the attorneys look. It's supposed to be based on the facts and the evidence presented to you. So we do want to thank you.

* * * * *

You look at the witnesses and you make a determination: "What reason do

these witnesses have to testify the way they did?"

In evaluating their testimony, are you going to believe them or not? You decide the credibility or the believability of the witnesses. What is their reasoning?

The governments witnesses: Mr. Tittle had no reason to lie. As a matter of fact, finally, they have admitted what he said was true. All that happened as Mr. Tittle had said it happened.

Then you look at the other witnesses. Now, remember there is a very imporant (sic) right that everyone has in the United States that we call the Fifth Amendment right. Everybody has the right to remain silent and they do not have to testify. In this particular case both defendants took the witness stand and testified. The Fifth Amendment does not say you have to believe them if they testify, because you evaluate their testimony just like you evaluate everybody else's testimony. What is their reason, if any, for testifying the way they did?

If we believe the evidence shows that they are guilty, that's their reason why they testified, to help prove and persuade you all that they are not guilty.

Let's look at the evidence. They say -- Mr. Isidro Morales and Mr. Gilberto Gonzales did this because they were going to trap some drug dealers.

Mr. Isidro Morales had no prior drug training, drug investigations in his life, no training, never did any drug arrests except for one roundup where bunches of people were arrested by the Sheriff and DPS.

Isidro Morales and Gilberto Gonzales, a man who was on probation for ten years with the state, these two men got together and they decided they were going to catch these drug dealers. And they didn't make any arrangements ahead of time. Mr. Morales says he called, but he only called on the telephone. Yet, in the past he had called on the radio also. He had driven personally to the Sheriff's Department, he had driven personally to the Sheriff's house yet, they didn't do any of those.

He said he called. Luckily it was a non-long distance call. There are no tolls on it. But he said he called. He didn't do any of the other methods. He from his own testimony finally he wasn't sure when or how many calls or when he finally decided he was going to arrest these drug dealers. He couldn't remember that. He kept changing the dates.

But at least the last time he said it was two days before he met with Mr. Title (sic), that this other man came by and talked to him, and that's when he went and recruited Mr. Gilberto Gonzales. Two days before.

During none of that time did he contact the Sheriff or did he attempt to contact the Sheriff.

On April 1st Mr. Tittle says he called at 10:00 o'clock and they were supposed to meet at 4:00 o'clock that afternoon. Six hours. And that Mr. Tittle contacted the Sheriff and let him know that there was an undercover operation involved, and the Sheriff said he made himself available to see if Isidro Morales would call him up. He did not.

Mr. Morales said he tried to call on the telephone at 2:00 o'clock, at 3:00 o'clock, and that was it. He got home at 11:00 o'clock. Yet, the radio log that the Sheriff keeps says he called in at 8:00 o'clock and no other traffic, that he left the house, coming back to the house again. He was there at 8:00 o'clock, and he didn't attempt to call the Sheriff again.

He didn't attempt to go by the Sheriff's house again, and the next morning when the meeting was supposed to be at 10:00 o'clock, he didn't get up and go. "No, I had some other important business to attend to."

Well, I thought this was important business in his life right now, the busting of these big drug dealers. That was a big important business in his life. He was going to get an important name for himself.

"No, I was too busy with other things to contact the Sheriff."

The Sheriff was monitoring the radio and was in radio communication with his office. He even overheard radio communication with Isidro Morales and his office and Isidro did not attempt to contact him or leave a message on the radio to contact him through the dispatcher. But he said he tried to call.

And it took him between four and five hours after his arrest to tell anyone that he was working undercover. Yet, against what Mr. Isidro Morales and Mr. Gilberto Gonzales said, there was ample opportunity to communicate that idea. Scream it out if nothing else. "Hey, there's a mistake. Hey, there is a mistake."

"There is a mistake," four words. Get their attention.

What does Gilberto say? "Call my sister or my sister-in-law." Well, if he told them there was a mistake and they were working undercover, there would be no need to call the sister-in-law. They would have said we made a mistake and you are working undercover. So what was the most important thing on his mind? "Call my sister-in-law." Not that, "There was a mistake and we were busting you. You shouldn't have busted us."

You look at the story, the credibility. You draw the reasonable inferences. Is it reasonable that to somebody with no training are going to make a big deal, with no training. He didn't know the proper procedure or

proper way to do it. All right, maybe he didn't have the training. Would you or I if we were in his circumstances or his situation, would we want to go and meet some drug dealers, some big drug dealers we wanted to bust without some backup, some help? You would make plans a long time ahead for a meeting.

"No, I was going to call them when they got there. Gilberto was going to keep them busy, and I was going to call them. Ten or fifteen or twenty minutes later I would have had my help."

You heard the Sheriff. There is only one Deputy on duty at that time of the morning. No DPS officers on duty. Border Patrol are in the area, but you don't know when or where they are going to be or whether they are tied up. You can't rely on what the situation would be. Especially with Mr. Isidro Morales being in the position at least three years prior to this time, he knew of the schedule.

That's exactly why he picked the time. He picked that time because he knew the schedule. He knew there was no DPS officer around. He knew there was only one Deputy Sheriff, and he had a scanner and would know where they were at.

Remember, he slipped up. The Judge asked him, I believe it was: "Why did you pick this time of the day?" He said, "Because there were very few people around to see what was going on."

I don't know if you caught that or not, but that's exactly what he said. No, they didn't want it to happen where people could get hurt or be in the way, arrested. No, nobody would be around to see what was going on.

And he know the schedule. He was in contact and communications with the Sheriff and the DPS all along. And he picked the time. Isidro Morales picked the time that it was going to go down.

He told Agent Tittle, "Be up there at 3:00 or 4:00 o'clock in the morning and you turn it over to my driver."

And Gilberto Gonzalez admits he knows the ranches. And he knows the ranchhands and foremen in that area and he had probably been on them himself before and he knew the ways to get around the checkpoint and he could find it.

Mr. Gonzales, "No, I was doing this for reward" -- a nebulous reward. The only reward or money he was looking for was the $500 he was going to get.

Remember, he says, "Money talks and hum walks." He was broke, and he would do anything for money. He would do anything for money. He said, "No, I was doing it for the reward. I know it's against the conditions of my probation, and if I did anything wrong I would go to jail."

One of the other conditions I asked him, "Isn't it true you are not supposed to associate with criminals

and crooks?" And if he started in this undercover operation this could have landed him in jail, too, without permission from his probation officer. But did he get it? No.

They did not contact or communicate with anyone, neither of them, prior to the time that they were arrested concerning a supposed undercover operation that they were involved in.

DEA called up everybody, expect the man that they were looking into, Isidro Morales. The defendants did not communicate with anyone and did not even bring up the subject until four to five hours after they were arrested, because it did not happen the way they want you to believe it happened.

It was a story that they made up after the arrest, after a time they could think about, "What can we say?"

Again, ladies and gentlemen, it really comes down to this: If you believe all of the facts showed that the defendants were doing a deal, a crooked deal, all of that evidence could prove and you can find them guilty of that charge of conspiracy.

If, on the other hand, you believe what they are saying, that it was an undercover operation on their part, then they did not have the intent to violate the law. And that's your decision and that's what you are going to make.

On the second count, Isidro Morales had the pistol. He had it when he talked to the agents on April 1st, had it in his lap under his leg, fooling with it, listening to the radio, watching the undercover surveillance van. Didn't know it was undercover surveillance, but he was nervous and suspicious. He had the pistol when he met on the 2nd again.

Both of those incidents will show that Isidro Morales and Gilberto Gonzales were dealing, were conspiring, did want to get the money for transporting marijuana.

By the way, the defense may come up and say, "We are only talking about one hundred pounds at $20 a pound, $2,000."

Remember, it was Agent Tittle in his conversation who said, "Look, I am worried about dealing with a guy I don't know. Let me limit it down to 100 pounds. But, you know, 500 pounds later on, a thousand pounds."

The defendant Isidro Morales was willing to move as much as the traffic would bear, and he was going to charge $20 a pound.

Would he lose his job for only $2,000? That's what they are going to argue you. The thing is that it was going to be just $2,000, because then that was Agent Tittle reducing the amount to that level. Isidro Morales was willing to move as much as the traffic would bear.

Thank you very much, ladies and gentlemen.

THE COURT: Thank you, Mr. Guerra. You have got six minutes left for rebuttal.

Mr. Nino, you have got 20 minutes.

PROBLEMATIC SUMMATION II (3R. 275)
(Emphasis added)

BY MR. GUERRA (closing):

Mr. Nino said well his man is uneducated, can't hardly read and write English and he didn't keep notes. Ladies and gentlemen, what about a note in Spanish, a word or two. You don't have to write -- just something, meet with so and so on this day, talking about marijuana. I will get him the next time. Anything in Spanish.

Nothing. Because there wasn't anything. It was a concocted story three or four or five hours after they got arrested.

And they said DEA had guns on me and they wouldn't let us talk. Well, when you are going in and arresting dopers and one in particular you know had a gun, would you have your weapons drawn if you were going to arrest them?

But they did have an opportunity with the Sheriff there, and they didn't do it. The Sheriff even asked Morales, "What's happening?"

"I don't know. Why these guys got us here?"

Gilberto Gonzales, said, "Hey, call my sister-in-law."

They had an opportunity, and they failed to do it.